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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER LANDAVAZO,

Petitioner

v.

THE TORO COMPANY,

Respondent.

On Petition for Writ of Certiorari

To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Constance R. Wannamaker
Counsel of Record
Chavez Law Firm
2101 N. Stanton Street
El Paso, Texas 79902
Telephone (915) 351-7772
Facsimile (915) 351-7773

QUESTION PRESENTED FOR REVIEW

Did the district court err when it dismissed, *sua sponte*, Petitioner's suit, for failure to state a claim under Federal Rule of Civil Procedure 8(a)(2), where Petitioner pleaded sufficient facts to state a claim for relief and provided Respondent with fair notice of his claim. Further, did the Fifth Circuit Court of Appeals, by affirming the district court, depart from the accepted and usual course of judicial proceedings and sanction such a departure by the district court?

LIST OF INTERESTED PARTIES

Petitioner Christopher Landavazo El Paso, Texas	Attorneys for Petitioner Constance R. Wannamaker Enrique Chavez, Jr. Chavez Law Firm 2101 N. Stanton Street El Paso, Texas 79902
Respondent The Toro Company	Attorneys for Respondent Charles C. High, Jr. Ken K. Slavin Kemp Smith, LLP P.O. Box 2800 El Paso, Texas 79999-2800

CORPORATE DISCLOSURE STATEMENT

Petitioner hereby submits his Corporate Disclosure Statement pursuant to Supreme Court Rule 29.6. Petitioner is unaware of any company that owns 10% or more of The Toro Company.

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B. Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment and Dismissing Plaintiff's Petition, United States District Court for the Western District of Texas, El Paso Division, Christopher Landavazo v. The Toro Company, No. EP-06-CA-356-FM, entered November 28, 2007.

C. Order Denying Petition for Rehearing United States Court of Appeals for the Fifth Circuit, Christopher Landavazo v. The Toro Company, No. 08-50227, Entered January 14, 2009.

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STATEMENT OF JURISDICTION

The Order sought to be reviewed was entered on December 5, 2008. Petitioner filed a Motion for Panel Rehearing on December 11, 2008. The Order denying Petitioner's Motion for Panel Rehearing was entered on January 14, 2009. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on a writ of certiorari the order in question.

RULES AND STATUTES INVOLVED

Federal Rule of Civil Procedure 8(a)(2):

(a) Claim for relief. A pleading that states a claim for relief must contain:

...

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; ....

Federal Rule of Civil Procedure 8(f):[1]

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

42 U.S.C. § 1981:

(a) Statement of Equal Rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance,

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[1] Rule 8(f) was replaced, effective December 1, 2007 with current Rule 8(e) which provides that "Pleadings must be construed to do justice." Fed.R.Civ.P. 8(e).

modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law.

Texas Labor Code Chapter 21.051

An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer:

(1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or

(2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

STATEMENT OF THE CASE

This petition for writ of certiorari comes before this Court following an appeal taken to the United States Court of Appeals for the Fifth Circuit. This appeal arose from the district court's *sua sponte* dismissal for failure to state a claim of Petitioner's employment discrimination claims under 42 U.S.C. § 1981 and the Texas Labor Code, and the subsequent denial of Petitioner's motion to reconsider the dismissal and for leave to amend his complaint.

Petitioner brought the underlying employment discrimination suit following the termination of his employment with Respondent, asserting that the purported reason for his termination was false, and that the true reasons for Respondent's actions included Petitioner's race, color or national origin. Petitioner initially filed his case in Texas state court, however Respondent removed the case to the United States District Court for the Western District of Texas. Petitioner prayed for recovery under 42 U.S.C. § 1981 and the Texas Labor Code, among other statutes. Respondent moved for summary judgment on the merits of Petitioner's claims. Petitioner did not oppose partial summary judgment on certain claims but did oppose summary judgment on his section 1981 and Texas Labor Code claims. The district court *sua sponte* determined that these claims had not been properly pleaded and ordered the case dismissed on November 28, 2007. Petitioner filed a motion for reconsideration and for leave to amend his complaint which were denied. Petitioner then filed

an appeal to the United States Court of Appeals for the Fifth Circuit. The court of appeals affirmed the district court on December 5, 2008. Petitioner filed a motion for panel rehearing which was denied on January 14, 2009.

Jurisdiction was proper in the United States District Court pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4) because Petitioner's claims arose under federal statutes providing for the protection of civil rights. The district court possessed supplemental jurisdiction of Petitioner's state law claims pursuant to 28 U.S.C. § 1367.

ARGUMENT

Question presented for review number one:

Did the district court err when it dismissed, *sua sponte*, Petitioner's suit, for failure to state a claim under Federal Rule of Civil Procedure 8(a)(2), where Petitioner pleaded sufficient facts to state a claim for relief and provided Respondent with fair notice of his claim. Further, did the Fifth Circuit Court of Appeals, by affirming the district court, depart from the accepted and usual course of judicial proceedings and sanction such a departure by the district court?

Petitioner urges this Court to exercise its judicial discretion and grant his writ of certiorari, reverse the Fifth Circuit Court of Appeals and remand his case to the district court for further proceedings. Petitioner contends that it is necessary for this Court to exercise its supervisory powers because the United States Court of Appeals for the Fifth Circuit has both departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court. In doing so, the court of appeals misapplied this Court's holding in *Bell Atlantic Corp., v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007). [2] Petitioner, thus, urges

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[2] On June 16, 2008, this Court granted a writ of certiorari in *Ashcroft v. Iqbal*, 128 S.Ct. 2931, which deals, in part, with the

this Court to grant his writ of certiorari to clarify that *Bell Atlantic* did not create a heightened pleading rule in employment discrimination cases.

I. The Federal Rules do not mandate a heightened pleading requirement in employment discrimination cases.

Federal Rule of Civil Procedure 8(a)(2) requires only that a plaintiff set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The district court, *sua sponte*, and the Fifth Circuit Court of Appeals on review, both determined that Petitioner failed to meet this minimal pleading requirement.

In an employment discrimination case, ordinary pleading rules apply. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 513, 122 S.Ct. 992, 997

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question of whether this Court's opinion in *Bell Atlantic Corp., v. Twombly*, 127 S.Ct. 1955 (2007), mandates that courts apply a heightened pleading standard in civil rights cases. Oral argument was heard on this case on December 10, 2008. *Iqbal*, however, deals with official governmental actors and qualified immunity issues in the context of a denial of a motion to dismiss. The case at bar deals instead with private actors in the context of a *sua sponte* dismissal by the district court. Therefore, Petitioner urges this Court to grant his writ of certiorari to determine whether the Fifth Circuit erred in interpreting *Bell Atlantic* to have changed the pleading standards for civil rights cases with private actors in the employment law context where the district court dismisses a complaint *sua sponte*.

(2002), *citing Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). There simply is no heightened pleading standard for such cases. *Swierkiewicz*, at 998. The rule is clear: no more is required than a short and plain statement of the claim. *Id.* Specific fact allegations are not necessary. *Erickson v. Pardus*, 551 U.S. 89, ---, 127 S.Ct. 2197, 2200 (2007). The statement must merely provide the defendant with fair notice of what the plaintiff's claim is. *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99 (1957).

"The Rules of Civil Procedure make a complaint just the starting point." *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998). Our liberal discovery rules and various mechanisms to challenge and dispose of unmeritorious claims act as a check on our simple pleading standards. *Swierkiewicz*, 122 S.Ct. at 998, *citing Conley*, 355 U.S. at 47-48. A complaint need not identify legal theories. *Bennett*, 153 F.3d at 518. Nor need a plaintiff plead evidence. *Id.*, *citing American Nurses' Assoc. v. Illinois*, 783 F.2d 716, 727 (7th Cir. 1986).

II. Petitioner's Pleadings Fulfilled the Requirements of Federal Rule of Civil Procedure 8(a)(2).

Petitioner's original petition[3] filed in state court stated:

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[3] "Petition" is the term used to describe a plaintiff's complaint under Texas' state-court procedure. Tex.R.Civ.P. 22.

> Mr. Landavazo was a production manager with Defendant. Mr. Landavazo was terminated on or about December 9, 2004. Defendant purportedly terminated his employment because Plaintiff supposedly claimed unworked overtime. This purported reason is false, pretextual and a mere excuse for unlawful motivations. The real reasons Mr. Landavazo was discriminated and retaliated against in the terms, conditions and privileges of his employment is because of his race, color, national origin and or ethnicity in violation of the Fair Labor Standards Act, Title 29, United states Code, Section 201, et. seq., 29 U.S.C. §201 et. seq.

Petitioner's prayer for relief requested:

> actual damages, statutory and punitive damages under the Texas Labor Code, and the Civil Rights Acts of 1866, 42 U.S.C. § 1981 and the Civil Rights Acts of 1991, 42 U.S.C. § 1981a, 42 U.S.C. 2000e, *et seq.*, 29 U.S.C., [sic] § 201 *et.* [sic] *seq.*, prejudgment interest, post-judgment interest, attorney's fees, expert fees, costs and such

> other and further relief to which he may show himself to be justly entitled, in law and in equity.

Petitioner's pleadings set forth a short and plain statement of the claim showing that he is entitled to relief. He stated his position with Respondent's company. He stated the purported reason for his termination and that the reason was pretextual and an excuse for unlawful motivations. He further alleged that the real reasons Respondent discriminated against him in his employment were because of his race, color, national origin or ethnicity. He further specifically lists the statutes under which he seeks to recover damages. Thus, he has presented a short and plain statement of his claim showing his entitlement to relief as required by Rule 8(a)(2). Moreover, as is evident from Respondent's actions, Petitioner's pleadings fulfilled their obligation to put the opposing party on notice of the nature of his claims and the basis for them. *Swierkiewicz*, 122 S.Ct. at 998.

Before removing the case to federal court, Respondent filed an answer and special exceptions[4] in state court which, in no way, complained or argued that there was any defect or insufficiency in Petitioner's pleadings. Rather, the special exceptions asked that Petitioner plead the maximum amount of damages he was seeking. Moreover, the

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[4] Under Texas state procedure, special exceptions are used to challenge defects or insufficiencies in the allegations of the opposing party's pleadings. Tex.R.Civ.P. 91.

Respondent's answer stated, as one of its defenses, the caps on damages imposed on discrimination cases under the Texas Labor Code.

Following its removal of Petitioner's case to federal court, Respondent never filed any pleadings challenging the sufficiency of Petitioner's petition. It did not file any motion under Rule 8, nor did it file a Rule 12(e) motion for a more definite statement. Likewise, Respondent did not file a Rule 12 (b)(6) motion for dismissal for failure to state a claim. At no time did Respondent request a dismissal based on insufficient pleading. Rather, it filed a motion for summary judgment challenging the merits of Petitioner's allegations.

In its motion for summary judgment, Respondent briefly indicated, for the first time, and without argument or authorities, that it believed that Petitioner had not pled a cause of action for discrimination under section 1981 or the Texas Labor Code. Respondent's sole contention that Petitioner failed to state a claim was:

> While not specifically pled as causes of action, Plaintiff prays for relief under Title VII of the Civil Rights Act, the Texas Labor Code and 42 U.S.C. § 1981. Out of an abundance of caution but maintaining its position that no cause of action is pled under any of these statutes, Defendant submits that, in any event, there is no evidence to support

> any claim of national origin or race discrimination.

Respondent then proceeded to argue why the court should grant summary judgment in its favor on the merits of Petitioner's 42 U.S.C. § 1981 and Texas Labor Code claims.[5] Petitioner responded to the motion for summary judgment, arguing his case on the merits of his discrimination claims.

Respondent filed a lengthy reply to Petitioner's response, stating in its introductory paragraph that it does not believe that Petitioner properly pled sufficient facts to state a claim under either § 1981 or the Texas Labor Code. Nowhere else did Respondent challenge Petitioner's pleadings. It then proceeded to argue the merits of Petitioner's allegations.

Before the district court dismissed Petitioner's case, the case was set for trial for December 3, 2007. Both parties submitted pre-trial pleadings, including proposed jury instructions and verdict form. Notably, Respondent's filings included proposed questions and instructions to the jury regarding Petitioner's employment discrimination claims. Respondent even submitted a statement of defenses addressing discrimination on race and national origin.

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[5] In Petitioner's response to Respondent's motion for summary judgment he conceded that summary judgment was proper on his Fair Labor Standards Act and Title VII claims.

Thus, it is clear from all of the actions of the Respondent that it had ample notice of Petitioner's claims of employment discrimination as it vigorously defended against them by engaging in discovery on them, preparing for trial on them, and filing a motion for summary judgment on them. Certainly, then, Petitioner's pleadings did what they are supposed to do: put the opposing party on notice of the claims and the grounds therefor. *Swierkiewicz*, 122 S.Ct. at 998.

III. The district court and the court of appeals erroneously applied heightened and incorrect standards to Petitioner's pleadings.

The district court, in its opinion *sua sponte* dismissing Petitioner's claims, found that the petition "contains vague and all-encompassing designations which do not meet minimum pleading requirements." (Appendix at B, p. 7). The court further indicated that Petitioner had not pleaded sufficient facts to establish a prima facie case under Title VII because he relies on conclusory factual statements and a "laundry list" of statutes in his prayer. Id. The court then merely applied this "analysis" to the section 1981 and Texas Labor Code claims and dismisses them as well. Notably, the court states affirmatively that Petitioner did not "plead properly sufficient facts to establish a prima facie claim under Section 1981 and The Texas Labor Code." Id.

In *Swierkiewicz v. Sorema N.A.*, this Court reversed the dismissal of the plaintiff's employment discrimination suit, specifically holding that her complaint need not allege the specific facts necessary to establish a prima facie case of discrimination. 534 U.S. 506, 508, 122 S.Ct. 992, 995 (2002). This is exactly, however, what the district court was demanding that Petitioner do here. Accordingly, the district court misapplied the pleading standards of Rule 8(a)(2) when it *sua sponte* dismissed Petitioner's complaint.

The Fifth Circuit then sanctioned this misapplication of the rule by affirming the district court. The court of appeals first decided that the district court did not dismiss Petitioner's case *sua sponte*, because Respondent had raised the pleading deficiencies, albeit without argument. It is simply unfathomable that Respondent's two sentences referencing pleading deficiencies, without any authority or argument, suffice as a request for a dismissal for insufficient pleading while Petitioner's two paragraphs describing his allegations do not state a claim. Nonetheless, the court of appeals held that because Respondent briefly referenced pleading in its motion for summary judgment the district court's dismissal was not *sua sponte*. The court of appeals then declared that whether the district court dismissed *sua sponte* was immaterial, as the court possesses the power to consider pleading sufficiencies on its own accord. (Appendix at A, p. 6).

The court of appeals characterizes Petitioner's claims as conclusory allegations providing no notice

to Respondent of the actions from which arise Petitioner's claims. As previously discussed, *supra*, Respondent certainly acted as though it was well-informed of the nature of Petitioner's allegations. Nonetheless, the court of appeals deems Petitioner's allegations to be conclusory and therefore insufficient. The court of appeals, in doing so, relies heavily on the language of this Court's recent opinion in *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), to apply what amounts to a heightened pleading standard to Petitioner's complaint.

In *Bell Atlantic*, the Court was confronted with a complaint raising allegations of violations of § 1 of the Sherman Act, 15 U.S.C. § 1, and had to determine whether that complaint contained sufficient allegations to survive a motion to dismiss. 127 S.Ct. at 1961. The Court held that stating a claim under § 1 of the Sherman Act requires that a complaint allege enough facts to suggest an agreement between the competitors occurred. *Id.* at 1965. In doing so, the Court stated that it was not imposing a probability requirement on the pleadings, but was rather asking for enough fact to raise a reasonable expectation that discovery will uncover some evidence of illegality. *Id.* The Court, importantly, reiterated that it was not creating a heightened pleading standard, but rather was requiring a plaintiff to allege enough facts to state a claim that is plausible on its face. 127 S.Ct. at 1974.

The Court reaffirmed, however that a complaint need not contain *detailed* factual

allegations. *Id.* at 1964. Rather, the factual allegations need only be sufficient to raise a right to relief above the speculative level, taking all of the allegations in the complaint as true. *Id.* at 1965. This standard merely directs that the complaint contain enough fact to raise a reasonable expectation that discovery will reveal evidence of some culpable conduct. *Id.*

Shortly after deciding *Bell Atlantic*, this Court granted certiorari in *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197. In *Erickson*, the plaintiff, a prisoner in the State of Colorado, filed a pro se complaint alleging violations of his Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment. 127 S.Ct. 2197. His allegations arose from the alleged denial of treatment for hepatitis C. *Id.* at 2198. The Tenth Court of Appeals had determined that the plaintiff's allegations were conclusory and affirmed the dismissal of his complaint. *Id.*

In granting his petition for writ of certiorari and reversing the court of appeals, this Court held that the plaintiff's allegations stating that defendant's actions were "endangering [his] life" and his medication was withheld "shortly after" he began a lengthy treatment program, and that he "was still in need of treatment for the disease," were sufficient to satisfy the requirements of Rule 8(a)(2). *Erickson*, 127 S.Ct. at 2200.

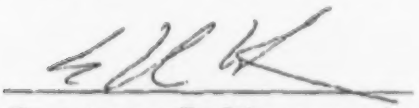
Erickson is similar to the case at bar. Petitioner here made a short and plain statement of his claims, however the Fifth Circuit Court of

Appeals deemed them to be conclusory. Because the statements were sufficient, however, to put the Respondent on notice of his claims, they satisfy the liberal requirements of Rule 8. Thus, as in *Erickson*, the court of appeals here has deviated from the standard and inappropriately applied a heightened pleading requirement to Petitioner's complaint. Thus, Petitioner urges this Court to grant his petition and reverse the court of appeals.

CONCLUSION AND PRAYER

Petitioner urges this Court to grant his petition for writ of certiorari because the district court and the Fifth Circuit Court of Appeals so grossly deviated from the pleading standards of the Federal Rules that intervention from this Court is both appropriate and necessary. The court of appeals sanctioned the district court's application of an improper standard to Petitioner's pleadings; that requiring that he demonstrate facts sufficient to show a prima facie case of discrimination in his complaint. Then the court of appeals misapplied Rule 8(a)(2) and this Court's holding in *Bell Atlantic v. Twombly* in affirming the district court. Accordingly, Petitioner respectfully urges the Court to grant his petition, reverse the court of appeals and remand his case for further proceedings.

Respectfully submitted,



Constance R. Wannamaker
Chavez Law Firm
2101 N. Stanton Street
El Paso, Texas 79902
Telephone (915) 351-7772
Facsimile (915) 351-7773

APPENDIX

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APPENDIX

A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS

No. 08-50227

FILED

December 5, 2008

CHRISTOPHER LANDAVAZO

Plaintiff - Appelant

v.

THE TORO COMPANY

Defendant - Appelee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:06-CV-356

Before SMITH, STEWART, and
SOUTHWICK, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Christopher Landavazo ("Landavazo") appeals from the district court's final judgment dismissing Landavazo's claims against his former employer, The Toro Company ("Toro"), under 42 U.S.C. § 1981 and the Texas Labor Code. Landavazo argues that the district court erred in dismissing Landavazo's suit *sua sponte* for failure to state a claim and in denying Landavazo's motion for leave to amend his complaint. For the following reasons, we AFFIRM.

I. Factual and Procedural Background

Landavazo, represented by counsel, filed this action seeking damages from Toro for alleged violations of the Fair Labor Standards Act ("FLSA"). The factual basis of the original complaint states in toto the following:

> Mr. Landavazo was a Production Manager with Defendant.
>
> Mr. Landavazo was terminated on or about December 9, 2004. Defendant purportedly terminated

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* Pursuant to 5th CIR R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set fourth in the 5TH CIR. R 47 5 4

> his employment because Plaintiff supposedly claimed unworked overtime. This purported reason is false, pretextual and a mere excuse for unlawful motivations. The real reasons Mr. Landavazos . was discriminated and retaliated against in the terms, conditions and privileges of his employment is because of his race, color, national origin and or ethnicity and or in violation of the Fair Labor Standards Act, Title 29, United States Code, Section 201, et seq., U.S.C. § 201 et seq.

Landavazo's prayer for relief also sought damages under Title VII, 42 U.S.C. § 1981, and the Texas Labor Code, although he did not specifically allege violations of those statutes in the complaint.

Almost one year after the original complaint was filed, Toro filed a motion for summary judgment. In its motion, Toro argued that Landavazo failed to state a claim under the FLSA because he was a salaried supervisor exempt from the overtime payment requirements of the FLSA and there was no evidence that he engaged in any protected activity. As to any claims under Title VII, § 1981, and the Texas Labor Code, Toro stated that "[o]ut of an abundance of caution but maintaining its position that no cause of action is pled under any of these statutes,

[Toro] submits that, in any event, there is no evidence to support any claim of national origin or race discrimination."

In response to Toro's motion for summary judgment on his FLSA and Title VII claims and district court granted Toro's motion for summary judgment on those claims. Landavazo argued, however, that the evidence precluded summary judgment on the discrimination claims under § 1981 and the Texas Labor Code. The district court did not review the § 1981 ant Texas Labor Code claims under a summary judgment standard, but rather, the court dismissed those claims for failure to comport with the pleading standards set forth in Federal Rule of Civil Procedure 8(a)(2).

Landavazo filed a motion for reconsideration, contending that he sufficiently pled his claims and the court erred in dismissing the case *sua sponte* without allowing him an opportunity to amend. Landavazo sought leave to amend the complaint and attached the proposed amended complaint to the motion for reconsideration. The district court denied the motion for reconsideration, stating that

> Plaintiff's Petition does not properly plead Plaintiff's putative Section 1981 and Texas Labor Code claims. . . . Plaintiff's Amended Complaint still does not contain any factual

> allegations that properly state his putative Section 1981 and Texas Labor Code [c]laims. . . . The Court finds Plaintiff's Amended Complaint does not cure his original Petition's defects and therefore concludes it is not unjust to deny Plaintiff's Motion for Reconsideration and his request for leave to amend his Petition.

Landavazo appeals, challenging the dismissal of the § 1981 and Texas Labor Code claims and the denial of leave to file an amended complaint.

II. Discussion

A. *Sua Sponte Dismissal*

Landavazo emphasizes that the district court dismissed his suit *sua sponte*. While Toro did not file a separate motion to dismiss, its motion for summary judgment clearly "maintain[ed] that no cause of action [was] pled under" § 1981 and Texas Labor Code.[1] Notably, Toro made no legal arguments regarding the pleading deficiency, but Landavazo simply ignored the argument that

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[1] Toro also argued that no cause of action was pled under Title VII. Landavazo's Title VII claim is not an issue on appeal.

was raised about the pleading deficiency, but Landavazo simply ignored the argument that was raised about the pleading deficiency. The district court considered Toro's pleading deficiency. The district court considered Toro's pleading deficiency argument, stating that "Defendant asserts that Plaintiff fails to properly plead any cause of action under Title VII, Section 1981, or the Texas Labor Code." The record demonstrates that the district court did not raise the pleading deficiency issue *sua sponte*, although it did not have the benefit of any legal arguments on the issue.

Even assuming *arguendo* that the district court raised the issue *sua sponte*, it has authority to consider the sufficiency of a complaint on its own initiative. See Carroll v. Fort James Corp., 470 F.3d 1171, 1177 (5th Cir 2006) ("As a general rule, a district court may dismiss a complaint on its own for failure to state a claim.") (citation omitted).

B. Failure to State a Claim

Federal Rule of Civil Procedure 8(a) provides that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). We review dismissal of a complaint for failure to state a claim *de novo*. *Lindquist v. City of Pasadena, Tex.*, 525 F.3d 383, 386, (5th Circuit 2008) (citation omitted). We accept all well-pleaded facts as true, "viewing them in the light most favorable to the plaintiff. *Id.* (citation omitted). The plaintiff must allege

"enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955. 1974 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. at 1965 (internal citation and footnote omitted).

We set out the entire factual allegations of Landavazo's original pleading above. The only factual allegations in the entire pleading are Landavazo's job title, the date of termination, and the purported reason for termination. The remaining allegations either deny the purported reason for the termination without any affirmative allegations or state legal conclusions. Specifically, Landavazo's allegation that the "purported reason is false, pretextual and a mere excuse for unlawful motivations" is, at most, a conclusory allegation and provides no notice of Toro's acts that gives rise to this action. Further, Landavazo's statement that "[t]he real reasons Mr. Landavazo was discriminated and retaliated against in the terms, conditions and privileges of his employment is because of his race, color, national origin and or ethnicity and or in violation of the Fair Labor Standards Act" is merely a legal conclusion. Landavazo's factual allegations are not enough to raise his right to relief above the speculative level. *See Twombly*, 127 S. Ct. at 1965; Rios v. City of Del Rio, Tex., 444 F.3d 417, 421 (5th Cir. 2006)

("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.") (quotation and citation omitted).

Conspicuously missing from the pleading are minimal facts pertaining to Landavazo's race, ethnicity, and/or national origin; any acts of alleged retaliation or discriminatory conduct; or any other facts related to a discrimination or retaliation claim. Even though the district court liberally construed the pleading as asserting claims under § 1981 and the Texas Labor Code, it properly dismissed those claims for failure to state a claim upon which relief could be granted.

C. Motion for Reconsideration and Leave to Amend Complaint

The denial of a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e) is reviewed for abuse of discretion. *Dearmore v. City of Garland*, 519 F.3d 517, 520 (5th Cir. 2008) (citation omitted). We also review a district court's denial of leave to amend a complaint for abuse of discretion. *Carroll*, 470 F.3d at 1174. "Because of the liberal pleading presumption underlying Rule 15(a),[2] we have acknowledged that the term 'discretion' in this context 'may be misleading, because

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[2] Federal Rule of Civil Procedure 15(a) provides in part that "[t]he court should freely give leave when justice so requires." FED. R. CIV. P. 15(a)(2).

Fed.R.Civ.P. 15(a) evinces a bias in favor of granting leave to amend.'" *Mayeaux v. Louisiana Health Serv. & Indem. Co.*, 376 F.3d 420, 425 (5th Cir. 2004) (citation omitted). "[A]bsent a 'substantial reason' such as undue delay, bad faith dilatory motive, repeated failures to cure deficiencies, or undue prejudice to the opposing party, 'the discretion of the district court is not broad enough to permit denial.'" *Id.* (citation omitted).

The district court does not abuse its discretion in denying leave to amend if allowing amendment of the complaint would be futile. Briggs v. Mississippi, 331 F.3d 499, 508 (5th Cir. 2003) ("[T]he proposed amended complaint could not survive a Fed. R. Civ. P. 12(b)(6) motion and allowing [plaintiff could not survive a Fed. R. Civ. P. 12(b) motion and allowing [plaintiff] to amend the complaint would be futile."); see *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000). Therefore, we review the proposed amended complaint under "the same standard of legal sufficiency as applies under Rule 12(b)(6)." Id. (citations omitted).

While Landavozo's amended complaint makes more allegations, the amended complaint still would not survive a Rule 12(b) motion to dismiss. A review of the amended complaint leaves the reader speculating as to what conduct, even if taken as true, occurred that would give rise to a right to relief. To survive a motion to dismiss, a complaint alleging claims of discrimination must make

factual allegations sufficient to put the defendant on notice of the alleged unlawful conduct. Conclusory allegations are insufficient. Rule 8 requires the plaintiff to make a "showing" that he is "entitled to relief." *Twombly* 127 S. Ct. at 1965 n.3 ("Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests."). The amended complaint fails to allege notice to Toro of the basis of the claims. Therefore, granting leave to file the amended complaint would have been futile, and the district court did not abuse its discretion in denying to amend.

III. Conclusion

For the foregoing reasons, we AFFIRM.

APPENDIX

B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 08-50227

U.S. COURT OF APPEALS
FILED
JAN 14 2009
CHARLES R. FULBRUGE III

CHRISTOPHER LANDAVAZO

Plaintiff - Appelant

v.

THE TORO COMPANY

Defendant - Appelee

Appeal from the United States District Court
for the
Western District of Texas, El Paso

ON PETITION FOR REHERARING

Before SMITH, STEWART, and
SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart

United States Circuit Judge

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CHRISTOPHER LANDAVAZO		11-28-07
	§	Clerk, U.S.
	§	District Court,
	§	Western District
	§	of Texas
Plaintiff,	§	
	§	
v.	§	No. EP-06-CA-356-FM
	§	
THE TORO COMPANY	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFF'S PETITION

On this day the Court considered Defendant The Toro Company's ("Defendant") "Defendant's Motion for Summary Judgment" ("Motion") [Rec. No. 14], filed on July 31, 2007; Plaintiff Christopher Landavazo's ("Plaintiff") "Plaintiff's Response to Defendant's Motion for Summary Judgment" (Response") [Rec. No. 20], filed on August 13, 2007; "Defendant's Rely in Support of Motion for Summary Judgment" ("Reply") [Rec. No. 24], filed on

August 24,2007; and "Defendant's Objections to and Motion to Strike Plaintiff's Summary Judgment Evidence" (Motion to Strike") [Rec. No. 23], filed on August 24, 2007. In its Motion, Defendant urges the Court to enter summary judgment in its favor and dismiss "Plaintiff's Petition" (Petition") [Rec. No. 2, Ex. 1]. For the reasons discussed below, the Court concludes it should grant Defendant's Motion and dismiss Plaintiff's Petition.

I. BACKGROUND

Plaintiff filed his Petition in the District Court of El Paso County, Texas, 34th Judicial District, on August 9, 2006. Defendant timely removed this action to federal district court pursuant to 28 U.S.S. § 1441. In his Petition, Plaintiff alleges Defendant violated the Federal Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et. seq*. In his prayer for relief, Plaintiff also requests that he recover damages "under the Texas Labor Code, and the Civil Rights Act of 1866, 42 U.S.C. § 1981 ["Section 1981"] and the Civil Rights Act of 1991, 42 U.S.C. § 201 et. seq."[1]

In its Motion, Defendant argues that Plaintiff fails to state a claim under the FLSA. Moreover, Defendant asserts that Plaintiff fails to properly plead any cause of action under Title VII, Section 1981, or the Texas Labor Code. In Plaintiff's

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[1] Pl.'s Pet., Rec. No. 2, Ex.1, at ¶ IX.

Response, he concedes that Defendant is entitled to summary judgment on his FLSA and Title VII claims. However, Plaintiff argues that there is a genuine issue of material fact raised as to Plaintiff's Section 1981 and Texas Labor Code claims. In its Reply, Defendant avers Plaintiff has not properly pleaded any cause of action under Section 1981 or the Texas Labor Code.

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56 ("Rule 56") governs motions for summary judgment. The purpose of Rule 56 is to "enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues."[2] Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[3] Under Rule 56 (c) "judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

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[2] *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

[3] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)

material fact and the moving party is entitled to a judgment as a matter of law.[4]

The party moving for summary judgment must "demonstrate the absence of a genuine issue of material fact," but it need not negate the elements of the nonmovant's case.[5] Since the moving bears the burden of proof, the Court construes the evidence in the opponent's favor and extends him the benefit of all favorable inferences.[6] When the moving party has properly supported his summary motion, the non-moving party must come forward with "significant probative evidence" showing that there is an issue regarding material facts.[7] The nonmovant may not simply rely on "vague assertions that additional discovery will produce needed, but unspecified facts."[8] If the nonmovant fails to set

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[4] FED. R. CIV. P. 56(c); see Celotex, 477 U.S. at 324 ("Rule 56(c) summary judgment is appropriate where it appears from the pleadings, depositions, admissions, and affidavits, that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law).

[5] *See Little v. Liquid Air Corp.*, 37F.3d 1069, 1075 (5th Cir. 1990) (quoting *Celotex*, 477 U.S. at 323).

[6] *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

[7] *Ferguson v. Natl. Broad. Co., Inc.*, 584 F.2d 111, 114 (5th Cir. 1978)

[8] S.E.C. v. Spence & Green, 612 F.2d 896, 901 (5th Cir. 1980); see also Celotex, 477 U.S. at 324 ("Rule 56(c) therefore requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the depositions, answers to interrogatories, and admissions on file designate specific facts showing that there is a genuine issue for trial."); Anderson v. Liberty Lobby, Inc., 477

forth specific facts in support of allegations essential to that party's claim and on which that party will bear the burden of proof at trial, then a grant of summary judgment is appropriate.[9] Even if the nonmovant presents evidence to support his allegations, summary judgment will still be appropriate "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."[10]

III. PLEADINGS STANDARD

Federal Rule of Civil Procedure 8 ("Rule 8") governs the adequacy of pleadings.[11] Rule 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[12] The Fifth Circuit has noted that "[a] complaint which contains a bare bones allegation that a wrong occurred and which does not plead any of the facts

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U.S. 242, 247-48 (1986) ("Some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.") (emphasis in original).

[9] *Celotex*, 477 U.S. 317 at 321-25.

[10] *Anderson*, 477 U.S. at 249-50.

[11] *See* FED. R. CIV. P. 8.

[12] FED. R. CIV. P. 8(a)(2).

giving rise to the injury, does not provide adequate notice."[13]

IV. DISCUSSION

A. FLSA Claim

Because Plaintiff concedes in his Response that he cannot support his FLSA claim, the Court concludes that it should grant Defendant's Motion regarding Plaintiff's FLSA claim.

B. Title VII Claim

Because Plaintiff concedes in his Response that his putative Title VII claim was not timely,[14] the Court concludes that it should grant Defendant's Motion regarding Plaintiff's Title VII claim. In the alternative, the Court concludes that Plaintiff did not properly plead his putative Title VII claim and therefore the court should dismiss it. Defendant argues in its Motion and Reply that Plaintiff fails to properly plead a cause of action under Title

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[13] Walker v. South Cent. Bell Tel. Co., 904 F.2d 275, 277 (5th Cir. 1990).

[14] Plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") on June 9, 2005. The EEOC issued a Right To Sue Letter on February 13, 2006, which informed Plaintiff he had ninety days in which to file a lawsuit in his cause. Plaintiff filed his Petition on August 9, 2006. Plaintiff is untimely as it was filed well past the ninety days allowed by the EEOC.

VII. In reviewing Plaintiff's Petition, the Court agrees and finds the Petition contains vague and all-encompasssing designations which do not meet minimum pleading requirements.[15] Even with the Court's liberal interpretation of Plaintiff's Petition, the Court finds that he has not properly pleaded sufficient facts to establish a prima facie claim under Title VII.[16] The Court concludes that Plaintiff's Petition does not provide adequate notice of a Title VII claim because Plaintiff relies soley on conclusory factual statements[17] and a laundry list of statutes in his prayer for relief.

C. 1981 and Texas Labor Code Claims

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[15] *See* FED. R. CIV. P. 8(a)(2); see also Walker, 904 F.2d at 277.

[16] Plaintiff's entire factual section in his Petition states that, "MR. LANDAVAZO was a Production Manager with Defendant. MR. LANDAVAZO was terminated on or about December 9, 2004. Defendant purportedly terminated his employment because Plaintiff supposedly claimed unworked overtime. This purposed reason is false, pretextual and a mere excuse for unlawful motivations. The real reasons MR. LANDAVAZO was discriminated and retaliated against n the terms, conditions, and privileges of his employment is because of his race, color, national origin and or ethnicity and or in violation of the Fair Labor Standards Act. Defendants willfully violated the Fair Labor Standards Act, Title 29, United States Code, Section 201, *et. seq.* 29 U.S.C. § 201 *et. seq.*" Pl's Pet., Rec. No. 2, Ex. 1, at ¶ IX.

[17] *See Walker*, 904 F.2d at 277.

Under the same analysis set forth above, the Court concludes that Plaintiff's punitive Section 1981 and the Texas Labor Code.

VI. CONCLUSION AND ORDERS

For the reasons the Court has discussed, it finds Defendant is entitled to summary judgment regarding Plaintiff's FLSA and Title VII claims against it. Moreover, the Court finds Plaintiff's putative Title VII claims against it. Moreover, the Court finds Plaintiff's putative Title VII, Section 1981, and Texas Labor Code claims should also be dismissed. The Court accordingly enters the following orders:

1. The Court GRANTS Defendant's Motion for Summary Judgment on Plaintiff's FLSA and Title VII claims [Rec. No. 14).
2. Alternatively, to the extent Plaintiff attempts to assert claims under Title VII, Section 1981, and the Texas Labor Code, the Court finds that Plaintiff's pleadings do not comport with the pleading standards set for the in Federal Rule of Civil Procedure 8(a)(2), and those putative claims are accordingly DISMISSED.

3. All pending motions in this cause, including Defendant's Motion to Strike [Rec. No. 23], are DENIED AS MOOT.

SO ORDERED.

SIGNED this 28th day of November, 2007.

/s/ Frank Montalvo
FRANK MONTALVO
UNITED STATES DISTRICT JUDGE